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19 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

20 RICHARD B. HOGUE,

CASE NO. **2:16-cv-01620-JCM-VCF**

21 Plaintiff,

22 vs.

23 ALLIED COLLECTION SERVICE, INC;  
SELENE FINANCE, LLC; MOUNTAIN  
24 AMERICA CREDIT UNION; SILVER  
STATE SCHOOLS CREDIT UNION; IBEW  
25 PLUS CREDIT UNION; EQUIFAX  
INFORMATION SERVICES, LLC;  
EXPERIAN INFORMATION SOLUTIONS,  
26 INC,  
27 Defendants.

**PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

1 Plaintiff Richard Hogue moves for partial summary judgment on the issue of Defendant  
 2 Silver State Schools Credit Union (“Silver State”) liability for failing to conduct a reasonable  
 3 investigation into Plaintiff’s consumer disputes and subsequently reporting inaccurate information on  
 4 Plaintiff’s credit reports, as well as failing to send its report of investigation to other credit reporting  
 5 agencies. In both respects, Silver State violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et*  
 6 *seq.* (“FCRA”). Plaintiff believes calculation of his damages is best decided by a jury of his peers,  
 7 and thus seeks judgment as a matter of law only as to liability.

8 **INTRODUCTION**

9 This case has to do with a loan Richard co-signed to help his cousin’s daughter’s  
 10 boyfriend buy a car. Unfortunately for Richard (and perhaps his cousin), the boyfriend  
 11 absconded, leaving Richard stuck with a car he didn’t want, and a bill he now couldn’t afford.  
 12 When Richard filed for Chapter 13 bankruptcy, he included the jointly held auto loan in his  
 13 bankruptcy schedules. Silver State wanted to collect, however, so they pried the debt out of the  
 14 bankruptcy and then sought to repossess the car. Richard complied with Silver State’s wishes,  
 15 permitted Silver State to repossess the car in the Spring of 2010, and believed that his hard-luck  
 16 relationship with Silver State had come to a close.

17 After Richard earned his Chapter 13 bankruptcy discharge in 2014, he ordered a copy of  
 18 his Experian credit report. To his surprise, he discovered that Silver State believed he existed in  
 19 three separate, mutually exclusive credit-related dimensions. First, Silver State reported that the  
 20 collateral had been *voluntarily surrendered* in 2010. Then, it reported the account had been  
 21 *discharged* in bankruptcy in 2014. Finally, Silver State reported that he still owed over \$14,000  
 22 on the loan but hadn’t made a payment in years, nor had been asked to do so – while at the same  
 23 time claiming that there was a \$0 balance on the account.

24 This three-dimensional paradox makes no sense under either prevailing industry reporting  
 25 guidelines, nor to anyone who may have looked at Richard’s credit report. It leads to the  
 26 fundamental question: were Richard’s obligations on the loan, as reported, actually included or  
 27 discharged in Chapter 13 bankruptcy, or weren’t they? It’s impossible to say for sure based on  
 28 Silver State’s reporting, and the information Silver State reported is materially misleading by  
 failing to make Richard’s debtor-creditor relationship clear. Instead, Silver State reported the

worst possible scenario: that that Richard surrendered the collateral, but also that the debt was “included” in his bankruptcy not on his petition date, but on his discharge date. Moreover, it wants to report that *despite* these two events – each of which would terminate Richard’s account relationship with Silver State either as a matter of law or a matter of fact – Richard *still* owed a post-discharge balance of more than \$14,000 on the loan.

One thing is clear, however: Richard’s account was unequivocally reporting as “negative,” and all three of these reported items of information pointed in that direction. 15 U.S.C. § 1681c and prevailing industry guidelines permit a tradeline to report “negatively” for up to 7 years following the date it was included in bankruptcy, and nothing on Experian’s reinvestigation indicates that this seven-year period would not run from the date these debts were “included” in Chapter 13 bankruptcy. Silver State’s paradoxical reporting had the consequence of “re-aging” Richard’s debt, and causing it to report negatively longer than legally permissible under either the FCRA, and violated Silver State’s obligation under 15 U.S.C. § 1681s-2(b) to report his account information accurately. This violation of the FCRA’s “aging” statutes under Section 1681c has had real consequences on Richard’s ability to put his name on his family’s home mortgage, and is also a salient issue for his continued employment with the federal government, which requires a security clearance.

Richard disputed his Silver State information with Experian as required under 15 U.S.C. §§ 1681i and 1681s-2(b), but Silver State kept reporting negatively. As it turned out, this strange reporting resulted from Silver State’s erroneous Automated Credit Dispute Verification (“ACDV”) to Experian in response to Richard’s dispute, in which Silver State reported the account as included in Chapter 13 bankruptcy, but also reported a status of “L,” which means “charge-off.” In so doing, Silver State violated industry standards regarding the reporting of accounts included in bankruptcy, for which it was supposed to report the account as having a zero balance and was current. And after Richard sued Silver State for its failure to correct his reporting, Silver State sought to punish Richard by contacting Experian, and *insisting* that the certain derogatory information should continue to be reported.<sup>1</sup>

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<sup>1</sup> Richard’s case also involves a likely impermissible credit pull from Silver State. While not part of his allegations here, it’s the subject of another class action in this District. See *Travers v. Experian Information Solutions, Inc.*, No. 17-cv-1591-JCM-CWH (D. Nev.).

1       Furthermore, Silver State also clearly failed to transmit the results of its investigation to  
 2 other data furnishers to whom it reported under 15 U.S.C. 1681s-2(b)(1)(D), because although  
 3 Silver State modified Richard's account and sent *Experian* an ACDV, Richard's January 2017  
 4 Trans Union credit report continued to report the account as "closed" in March of 2010, without  
 5 indicating that the account had been included in bankruptcy (and thus might have "aged off" of  
 6 his account).

7       As Richard found out as the case moved forward, it's actually not surprising that Silver  
 8 State reported such patently contradictory information – because Silver State's own record-  
 9 keeping is in shambles. Most astonishingly, Silver State confessed that it hadn't even retained a  
 10 copy of the industry-standard guidelines which purportedly governed how it would report his  
 11 account. Nor did Silver State have a copy of any contract with e-Oscar, the entity which would  
 12 have sent its investigation to the other CRAs (and around which it built its own internal reporting  
 13 guidelines). Moreover, the only shred of evidence Silver State produced any regarding its  
 14 relationship with Experian was a three-page, sixteen-year-old "subscriber agreement" which was not  
 15 signed by Experian, never mentioned e-Oscar, and suggested that Experian would "own" the data  
 16 Silver State provided to it. Thus, Silver State has produced no evidence that Experian ever agreed to  
 17 accept data from it, or the terms and conditions related to the same. In fact, Silver State failed to  
 18 keep many of the records of Richard's dispute which its "policies" required that it keep, and its own  
 19 internal loan records indicate that the account balance reported to Experian and the actual account  
 20 balance are different. This lackadaisical record-keeping demonstrates that Silver State was reckless  
 21 in attempting to comply with its FCRA obligations, which equates to willfulness under the FCRA.

22       Finally, and while not specifically part of Richard's motion for partial summary judgment,  
 23 he's also entitled to recover statutory damages for Silver State's willful violation of the FCRA, as  
 24 well as actual damages for any negligent failure of Silver State.<sup>2</sup> In both instances, he's also entitled  
 25 to recover attorney's fees.<sup>3</sup>

26       In sum, there's no disputed issue of material fact that Silver State violated the FCRA's  
 27 reporting provisions at 15 U.S.C. 1681s-2(b), and the Court should enter partial summary

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28       <sup>2</sup> 15 U.S.C. §§ 1681n, 1681o.

<sup>3</sup> *Id.*

1 judgment in his favor. Richard's damages are more properly a question of fact for the jury, and  
 2 he wishes to present his damages from Silver State's violations to his peers at a later date.

3 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

4 **A. Richard helps his daughter's boyfriend purchase a car by co-signing for a loan.**

5 1. On August 8, 2009, Richard co-signed a loan from Silver State Schools Credit  
 6 Union with Daniel Harper, in order to finance the purchase of a used 2004 Suzuki Verona.<sup>4</sup> Mr.  
 7 Harper was Richard's cousin's daughter's boyfriend, who had been riding the bus for about a  
 8 year.<sup>5</sup> Richard's informal agreement would be that it would be Daniel's car,<sup>6</sup> and Daniel in fact  
 9 acquired possession of it after the purchase.<sup>7</sup> Consequently, it was agreed between Richard and  
 10 Daniel that Daniel would make the payments on the car.<sup>8</sup> Other than the test-drive, Richard  
 11 never drove the car,<sup>9</sup> and he never even had a set of keys for it.<sup>10</sup>

12 **B. Richard files for Chapter 13 Bankruptcy, including the Car in his voluntary  
 13 petition and providing for it in his Chapter 13 plan or reorganization.**

14 2. On January 31, 2009, Richard filed for Chapter 13 bankruptcy, after an injury left  
 15 him unable to work and he was subsequently laid off from his job.<sup>11</sup> Richard included the  
 16 Suzuki on Schedule D of his Petition, stating he intended to surrender his interest in the  
 17 vehicle.<sup>12</sup> Richard's understanding was that if Daniel wished to keep the car, he could continue  
 18 making the payments.<sup>13</sup> Daniel did make some of the payments after Richard filed bankruptcy,<sup>14</sup>

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19 <sup>4</sup> Excerpts from Feb. 10, 2017 Deposition of Richard Hogue ("Hogue Depo"), **Exhibit 22**, at 48:23-50:15; 52:3-  
 20 16; August 9, 2008 Credit Application for Suzuki Verona and Kelly Blue Book Estimate, SSSCU000004-7  
 21 ("Application"), **Exhibit 1**; Silver State Workflow History from 1/1/2000 to 2/1/2017, SSSCU000116-119  
 22 ("Workflow History"), **Exhibit 2**.

23 <sup>5</sup> Hogue Depo, 16:22-17:9; 45:8-23.

24 <sup>6</sup> *Id.* at 54:4-14.

25 <sup>7</sup> *Id.* at 55:18-56:2.

26 <sup>8</sup> See *id.* at 56:17-21; 66:17-20.

27 <sup>9</sup> *Id.* at 56:4-21.

28 <sup>10</sup> *Id.* at 101:15:17.

29 <sup>11</sup> *Id.* at 57:16-24; Voluntary Petition for Chapter 13 Bankruptcy, Case No. 09-11367-btb, ECF Dkt. 1 (Bankr. D.  
 30 Nev. Jan. 1, 2009) ("Petition"), **Exhibit 3**. Plaintiff requests this Court take judicial notice of any cited documents made in  
 31 court filings as matters of public record, pursuant to Fed. R. Civ. P. 201(b). *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*,  
 32 442 F.3d 741, 746 n.11 (9th Cir. 2006) (citing *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d  
 33 1360, 1364 (9th Cir. 1998)).

34 <sup>12</sup> Petition, at 17. John amended his bankruptcy schedules on June 9, 2009, continuing to list the Suzuki on  
 35 Schedule D as an asset for which he intended to surrender his interest. See Amended Schedules D, I, and J to Petition,  
 36 BK Doc. 45, June 9, 2009 ("Amended Schedules"), **Exhibit 4**.

37 <sup>13</sup> Hogue Depo, 66:7-16.

38 <sup>14</sup> *Id.* at 63:17-21.

1 but at some point stopped after he lost his job and the Suzuki broke down in the Summer of  
 2 2009.<sup>15</sup> About 4-5 weeks after that, Richard received a letter stating that the Suzuki had been  
 3 towed to a towing company yard.<sup>16</sup> As far as Richard was concerned, he had no more interest in  
 4 the Suzuki, and as far as he knew, Silver State could have retrieved it whenever they wanted.<sup>17</sup>

5       **C. Silver State takes the loan out of bankruptcy, repossesses the car, and terminates**  
 6 **its relationship with Richard.**

7       3. Based on this understanding of his contractual rights, Richard proceeded with his  
 8 bankruptcy. On October 29, 2009, the Bankruptcy Court entered an order confirming Richard's  
 9 plan #5, which listed his interest in the Suzuki as a "secured claim satisfied by the surrender of  
 10 collateral."<sup>18</sup> Thereon, he listed the interest in the Suzuki as voluntarily surrendered,<sup>19</sup> as he did  
 11 not have possession of the vehicle.<sup>20</sup> Silver State's internal records show it received notice of the  
 12 plan, although it appeared confused by the plan, as it claimed it was listed as "surrendered," not  
 13 that Richard would be "surrendering" his interest.<sup>21</sup>

14       4. On December 21, 2009, after the Court entered its order confirming Richard's  
 15 plan, Silver State subsequently moved for relief from the automatic stay with respect to the  
 16 Suzuki;<sup>22</sup> it re-urged its motion again in February 2010.<sup>23</sup> On March 16, 2010, the Court granted  
 17 Silver State's re-urged motion, which permitted Silver State to "exercise all legal rights *with*  
 18 *respect to its collateral*," but said nothing about Richard's *personal* responsibility for the debt.<sup>24</sup>  
 19 On March 25, 2009, the Court entered an order approving a modified Chapter 13 plan, which  
 20 again indicated that Richard would be "surrendering" his interest in the vehicle.<sup>25</sup> Silver State it  
 21 subsequently repossessed the vehicle and auctioned it off on April 15, 2010.<sup>26</sup>

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22       <sup>15</sup> *Id.* at 63:22-64:24.

23       <sup>16</sup> *Id.* at 67:3-7.

24       <sup>17</sup> *Id.* at 95:23-96:7.

25       <sup>18</sup> Order Confirming the Debtors Plan # 5, BK Doc. 65, Oct. 29, 2009 ("Oct. 2009 Confirmed Plan"), at 5-6, **Exhibit 5**.

26       <sup>19</sup> Hogue Depo, 78:22-79:3; Oct. 2009 Confirmed Plan, at 5-6.

27       <sup>20</sup> *Id.* at 83:16-21.

28       <sup>21</sup> Workflow History, at 3 (11/17/2009 entry). Silver State appears to have caught its mistake later, as a  
 2/16/2010 entry in the "Workflow History" indicates that "per notes member is surrendering vehicle." *Id.*

29       <sup>22</sup> Motion for Relief from the Automatic Stay, BK Doc. 76, Dec. 21, 2009 ("First Silver State Motion"), **Exhibit 6**.

30       <sup>23</sup> Amended as to Date Motion for Relief from the Automatic Stay, BK Doc. 84, Feb. 5, 2010 ("Second Silver State  
 31 Motion"), **Exhibit 7**.

32       <sup>24</sup> Order for Relief from the Automatic Stay, BK Doc. 98, Mar. 16, 2010 ("Stay Order") (emphasis added), **Exhibit 8**.

33       <sup>25</sup> Order Confirming the Debtors Plan # 7, BK Doc. 99, Mar. 25, 2009 ("Mar. 2010 Confirmed Plan"), **Exhibit 9**.

34       <sup>26</sup> Workflow History, at 2 (4/20/2010 entry).

1       5. Thereafter, Richard completed his bankruptcy. The Chapter 13 Standing  
 2 Trustee's Final Report lists his Silver State interest as "surrendered."<sup>27</sup> On March 30, 2014,  
 3 Richard earned his Chapter 13 bankruptcy discharge, which Silver State acknowledged.<sup>28</sup>

4           **D. After Richard completes his bankruptcy, he obtains his Experian credit report,  
 5 and disputes information contained thereon.**

6       6. Thereafter, Richard pulled his Experian credit report on April 28, 2015, in order  
 7 to determine if his reporting was accurate or if anyone was using his credit information.<sup>29</sup> On the  
 8 credit report, he discovered that Silver State reported that his account reported a "status" of  
 9 "included in bankruptcy," and under the "account history," that it had been "discharged Through  
 10 BK Ch 7, 11, or 12 on Apr 30, 2010."<sup>30</sup> Under the "payment history," Silver State reported a  
 11 slew of post-petition late payments from June 2009 through February 2010: 30 days late in June,  
 12 60 days in July, 90 days in August, 120 days in September, 150 days in October, and 180 days  
 13 late in every month from November 2009 through February 2010.<sup>31</sup> Finally, in March 2010,  
 14 Silver State reported that the collateral had been "voluntarily surrendered."<sup>32</sup>

15       7. On July 17, 2015, Richard disputed his information with Experian.<sup>33</sup> Thereon,  
 16 Richard requested that certain information be corrected. Specifically, Richard asked that the late  
 17 payments following the filing of Richard's bankruptcy be removed, and if they were not  
 18 removed, he requested that a 100-word statement be included on his account "of all the disputed  
 19 information contained in this letter regarding this account."<sup>34</sup> Richard testified that he believed  
 20 the "status" of his bankruptcy should report from the date he'd filed bankruptcy.<sup>35</sup> He also  
 21 testified that he did not believe the "recent balance" should have been "May of 2014," because

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22       <sup>27</sup> Chapter 13 Final Account and Report – Completed, BK Doc. 138, Apr. 14, 2014 ("Trustee's Report") at 2,  
**Exhibit 10.**

23       <sup>28</sup> Discharge of Debtor after Completion of Chapter 13 Plan, BK Doc. 141, May 30, 2014 ("Discharge Order"),  
 at 1, **Exhibit 11**; Defendant Silver State Schools Credit Union's Responses to Plaintiff's First Set of Requests for  
 Admission, Sept. 15, 2016 ("RFA Responses"), at 9, **Exhibit 25**.

24       <sup>29</sup> Hogue Depo, 118:19-119:1; Dispute to Experian, comprised of: (1) July 17, 2015 Letter to Experian,  
 RHOGUE0073-79 ("Letter"), Apr. 28, 2015 Experian Credit Report, No. 3348-0866-81, RHOGUE0080-105  
 ("Report"), Docket from U.S. Bankruptcy Court, No. 09-11367-btb, RHOGUE0106-127 ("Docket") and Driver's  
 License for Richard Hogue, RHOGUE0128 ("License") (collectively, the "Dispute"), **Exhibit 12**.

25       <sup>30</sup> Report at 7 of 24.

26       <sup>31</sup> *Id.*

27       <sup>32</sup> *Id.*

28       <sup>33</sup> Hogue Depo, 150:10-151:25; *see also* Dispute, at 1, 6.

29       <sup>34</sup> *See* Dispute, at 6.

30       <sup>35</sup> Hogue Depo, 184:4-19; *see also* Dispute, at 6.

this did not date from the date of the bankruptcy was filed.<sup>36</sup>

**E. Silver State receives notification of Richard's dispute from Experian.**

8. After receiving notification of Richard's dispute, Experian forwarded the same to Silver State via an Automated Credit Dispute Verification ("ACDV").<sup>37</sup> Experian also sent Silver State Mr. Hogue's dispute, Experian credit report, and identifying information, as demonstrated by a "Y" notation near the top of the ACDV.<sup>38</sup> While Silver State was supposed to keep a copy of this additional correspondence, it had failed to do so in this case.<sup>39</sup> However, Silver State testified that it had a copy of the consumer dispute Richard had sent via Experian,<sup>40</sup> and also admitted it had received notice to Richard's dispute in discovery.<sup>41</sup>

## **F. Silver State's Receipt of Richard's Dispute**

9. Experian sent its ACDV to Silver State through an online platform known as e-Oscar.<sup>42</sup> An ACDV is the only way Silver State receives notification of consumer disputes from CRAs like Experian,<sup>43</sup> in part because an ACDV, as opposed to other notices, provides a noticed date.<sup>44</sup> The ACDV “queue” in e-Oscar also requires different access credentials and security protocols than other “queues.”<sup>45</sup> When receiving an ACDV, Silver State receives a view of how the disputed trade line is being reported, as well as the information which the consumer wants reviewed.<sup>46</sup> Silver State would also receive a copy of the dispute letter and additional

<sup>36</sup> Hogue Depo. 187:16-188:11; see also Dispute, at 6.

<sup>37</sup> Feb. 3, 2017 Deposition of Tracy Meyer as Silver State Schools Credit Union’s 30(b)(6) witness (“Silver State Depo”), at 57:23-58:16; 169:12-170:10, **Exhibit 21**. See also August 3, 2016 ACDV Response from Silver State to Experian, SSSCU000099 (“ACDV Response”), **Exhibit 13**.

<sup>38</sup> Silver State Depo, 236:11-237:14; see also ACDV Response, at 1 (noting that a “Y” appears on “Document Viewed” portion of ACDV; Excerpts from Feb. 24, 2017 deposition of Anna Simmons as Experian’s 30(b)(6) witness in *Travers v. State Collection Services, Inc. et al.*, No. 16-cv-1848-RFB-PAL, ECF Dkt. 93-21 (D. Nev. July 3, 2017) (“Travers Experian Depo”), at 162:21-165:8 (noting that a “Y” on an ACDV means that additional information has been attached by Experian to the ACDV it sends to data furnishers), **Exhibit 23**. Silver State is an active party to the *Travers* case, appeared at the deposition in question, and had an opportunity to raise objections at this Experian deposition. See *id.*; Fed. R. Civ. Proc. 32(a)(3); Fed. R. Evid. 801(d).

<sup>39</sup> Silver State Depo, at 237:2-18.

<sup>40</sup> *Id.* at 95:22-97:10; ACDV Response.

<sup>41</sup> RFA Responses, at 10.

<sup>42</sup> Silver State Depo, 25:5-12; 44:11-22

<sup>43</sup> *Id.* at 58:17-59:6.

<sup>44</sup> *Id.* at 64:6-19. Silver State testified that it would not respond to notifications other than ACDVs, and thus its internal policies and procedures were designed to handle ACDVs that came over e-Oscar, not other notifications. See *id.* at 66:9-67:8.

<sup>45</sup> *Id.* at 65:15-25.

<sup>46</sup> *Id.* at 45:21-47:18.

1 information, if the CRA chose to send it on (as Experian had done here).<sup>47</sup> Once Silver State  
 2 completed its investigation of the consumer's account, it would send back an ACDV response to  
 3 the CRA who originally sent the ACDV in question.<sup>48</sup> Silver State testified that its policy is to  
 4 archive a copy of an ACDV response just prior to its submission back to the CRA through e-  
 5 Oscar, but in this case Silver State yet again failed to keep a record of Richard's draft ACDV  
 6 response.<sup>49</sup>

7 **G. Silver State's has no evidence of its policies and procedures.**

8 10. To respond to credit disputes, Silver State relies on a nine-page internal document  
 9 called a "Lending Manual."<sup>50</sup> Silver State also refers to an industry-wide resource known as the  
 10 Credit Reporting Resource Guide ("CRRG").<sup>51</sup> Along with providing guidance regarding proper  
 11 reporting in many scenarios, the CRRG contains a list of industry-specific codes, known as the  
 12 "Metro 2,"<sup>52</sup> which Silver State uses to respond to ACDV responses for accounts included in  
 13 bankruptcy.<sup>53</sup>

14 11. However, Silver State could not establish the evidentiary foundation of any of its  
 15 claimed policies and procedures. As to the CRRG, Silver State testified that it had destroyed the  
 16 applicable copy of the CRRG prior to the deposition and no longer had a copy of it in its  
 17 obtainable records.<sup>54</sup> As to its use of e-Oscar and relationship with Experian, the CRRG's "user  
 18 obligations" require that Silver State "agree to assume all responsibility concerning your use of the  
 19 CRRG, including meeting any requirements or obligations of your contracts with third parties."<sup>55</sup> In

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20 <sup>47</sup> *Id.* at 49:9-23.

21 <sup>48</sup> *Id.* at 73:6-12.

22 <sup>49</sup> *Id.* at 91:18-92:25. Silver State also archives AUDs, and none were sent in this case. *Id.* at 93:7-15. In  
 contrast, Silver State does not archive DR Notifications. *Id.* at 93:2-6. The parties obtained an actual ACDV  
 Response from Experian. *See ACDV Response.*

23 <sup>50</sup> *Id.* at 72:13-20; SSSCU Lending Manual, May 8, 2015, SSSCU000075-83 ("Lending Manual") (sealed),  
**Exhibit 18.**

24 <sup>51</sup> Silver State Depo, 33:12-21; *see also* 2013 Consumer Reporting Resource Guide, EXP\_RHOGUE\_000946-  
 001199 ("CRRG") (sealed), **Exhibit 19.**

25 <sup>52</sup> Silver State Depo, 35:8-36:7.

26 <sup>53</sup> *Id.* at 126:9-12. Silver State testified that she believed Experian uses the Metro 2 format, and Silver State  
 believed, based on observations of Experian credit reporting, that they followed the CRRG reporting guidelines  
 generally, and was not aware of any instance where Experian did not rely on either the Metro 2 format or the CRRG  
 guidelines. *Id.* at 134:6-14; 135:7-15. Silver State's witness also testified that she believed Experian had helped  
 create the CRRG. *Id.* at 136:19-22.

27 <sup>54</sup> *Id.* at 39:22-41:12. While Silver State indicated that it could "try" to find a copy of the applicable CDIA, it  
 never confirmed whether it had actually done so. *See id.* at 40:13-41:12.

28 <sup>55</sup> 2013 CRRG, at pg. i.

1 other related cases, Silver State claims to have a written contract with Experian;<sup>56</sup> but the best  
 2 evidence Silver State could produce was a three-page, sixteen-year-old “Subscriber Service  
 3 Agreement,” which Experian had not signed.<sup>57</sup> The agreement purported to require Silver State to  
 4 furnish accurate data to Experian,<sup>58</sup> although Experian would not guarantee that the data in its own  
 5 files, or any information it provided to Silver State, would be accurate.<sup>59</sup>

6       12. In other cases, Silver State has acknowledged that it only receives consumer dispute  
 7 from CRAs through e-Oscar.<sup>60</sup> Silver State’s May 2015 internal credit-dispute policy<sup>61</sup> provides e-  
 8 Oscar screen shots “[t]o show a step by step how to respond to a dispute on the e-Oscar system.”<sup>62</sup>  
 9 However, Silver State could not locate a copy of its written contract with e-Oscar,<sup>63</sup> and in fact could  
 10 only speculate whether any contract had ever been entered in to; thus, its 30(b)(6) witness could not  
 11 ultimately testify whether there were any restrictions on its use of e-Oscar at all.<sup>64</sup> The best she  
 12 could say was that if Silver State had any agreement with e-Oscar at all, the agreement would have  
 13 been entered into in 2003.<sup>65</sup> Silver State was unable to state whether it was able to refer back to a  
 14 copy of its written agreement with e-Oscar when it designed its internal credit-dispute policies and  
 15 procedures in 2015.<sup>66</sup>

#### 16           **H. Silver State’s ACDV Response contains errors.**

17       13. When evaluating a Chapter 13 dispute like Richard’s, Silver State would look at  
 his bankruptcy petition, the relevant schedules, the docket report, and the discharge, as well as

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20           <sup>56</sup> March 6, 2017 Deposition of Tracy Meyer as Silver State Schools Credit Union’s 30(b)(6) witness in *Travers v. State Collection Services, Inc. et al.*, No. 16-cv-1848-RFB-PAL, ECF Dkt. 93-26 (D. Nev. July 3, 2017) (“Travers Silver State Depo”), at 53:6-14, **Exhibit 24**. See Fed. R. Civ. Proc. 32(a)(3); Fed. R. Evid. 801(d). Silver State claims to have a contractual relationship with each of the four CRAs it reports data to (Equifax, Trans Union, Experian, and Innovis). *See id.*

21           <sup>57</sup> Travers Silver State Depo, 53:15-67:19; *see also* Nov. 21, 2000 Subscriber Service Agreement, SSSCU000133-135 (“Subscriber Agreement”) (sealed), **Exhibit 20**.

22           <sup>58</sup> *Id.* at 61:17-62:12; *See* Subscriber Agreement.

23           <sup>59</sup> *Id.* at 60:15-61:15; 66:23-67:15; *See* Subscriber Agreement.

24           <sup>60</sup> *Id.* at 52:2-7.

25           <sup>61</sup> *Id.* at 46:3-6.

26           <sup>62</sup> *Id.* at 47:15-21.

27           <sup>63</sup> *Id.* at 48:15-51:14. Ms. Meyer noted that in her personal experience, an entity named “OLDE” was the entity whom data furnishers would agree to terms and conditions with in order to access the e-Oscar system. *Id.* at 48:49-18.

28           <sup>64</sup> *Id.* at 44:3-51:14.

<sup>65</sup> *Id.* at 51:15-20.

<sup>66</sup> *Id.* at 46:7-48:1.

1 relevant bankruptcy documents.<sup>67</sup> Silver State acknowledged that Richard's October 29, 2009  
 2 plan of reorganization included an entry that Richard was "surrendering interest" in Daniel's  
 3 Suzuki Verona.<sup>68</sup> Silver State also acknowledged that it had filed an amended motion for relief  
 4 of the automatic stay months after the entry of the plan of reorganization, on February 5, 2010.<sup>69</sup>  
 5 Silver State also acknowledged that the Bankruptcy Court had entered an order granting relief  
 6 from the automatic stay on March 16, 2010.<sup>70</sup> Silver State claimed that the order permitted it to  
 7 exercise lien enforcement, but not collections,<sup>71</sup> and that the Trustee's Final Report indicated that  
 8 Richard's interest had been surrendered.<sup>72</sup>

9       14. Silver State submitted an ACDV response to Experian on August 3, 2016.<sup>73</sup>  
 10 Thereon, they reported a response code of "02 – modify account information as indicated."<sup>74</sup> In  
  11 their response, they reported an "original delinquency date" of January 2009, the date of  
  12 Richard's Chapter 13 petition, but left the subsequent late payments from June 2009 through  
  13 February 2009, as well as the "voluntary surrender" notation, in place without changing them.<sup>75</sup>  
  14 Paradoxically, Silver State took it upon itself to report a "closed date" of April 2010 – one month  
  15 *after* the interest was voluntarily surrendered – and then placed a "balance date" more than five  
  16 years after, on 5/30/2014 – the date of the bankruptcy discharge.<sup>76</sup> Silver State also reported  
  17 Richard's account with a status of "L," which meant "charge off."<sup>77</sup> Silver State acknowledged  
  18 that it could report a "charge off" only once, and that any derogatory reporting would continue  
  19 for seven years after the first "charge off" entry.<sup>78</sup>

### 19       I. Richard's Experian Reinvestigation Contains Errors.

20       15. On August 20, 2015, Richard received his reinvestigation results from Experian,

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22       <sup>67</sup> Silver State Depo, 144:7-145:17. Because Silver State organizes accounts by a generic "member number,"  
 23 when it receives a dispute containing only a partial and non-descriptive member number, it will investigate all of the  
  24 members' accounts to ensure accurate reporting. *Id.* at 97:11-99:1.

25       <sup>68</sup> *Id.* at 154:1-156:19.

26       <sup>69</sup> *Id.* at 156:20-157:10.

27       <sup>70</sup> *Id.* at 157:21-157.

28       <sup>71</sup> *Id.* at 158:22-159:22.

29       <sup>72</sup> *Id.* at 168:11-169:3.

30       <sup>73</sup> *Id.* at 169:12-170:14; ACDV Response.

31       <sup>74</sup> ACDV Response.

32       <sup>75</sup> *Id.*

33       <sup>76</sup> *Id.*

34       <sup>77</sup> Silver State Depo, 194:6-21.

35       <sup>78</sup> *Id.* at 194:16-197:2.

1 which indicated that a pair of Silver State accounts had been “updated” (even though he’d only  
 2 disputed one).<sup>79</sup> For the Silver State account Richard specified in his Dispute letter, Silver State  
 3 account had not included a statement of dispute as he’d requested.<sup>80</sup> On the account, Silver State  
 4 rereported the post-petition bankruptcy late payments from June 2009 through February 2010,  
 5 with the account being “voluntarily surrendered” in March 2010.<sup>81</sup> This occurred despite the fact  
 6 that the “account history” section of the credit report also indicated, “Debt *included* in Chapter  
 7 13 Bankruptcy on May 30, 2014,” without an indication as to whether that was the discharge  
 8 date or the petition date. Silver State’s witness testified that she believed “included” meant “part  
 9 of,” but that “discharged” meant “to do away with.”<sup>82</sup> There was no indication whether the May  
 10 30, 2014 date pertained to the date of Richard’s petition, or his discharge – and thus no  
 11 indication how long the account would continue reporting negatively on Richard’s account.<sup>83</sup>

12       16. Paradoxically, Silver State testified that it had updated the “balance date” to May  
 13 30, 2014, and that that date represented “the last time that there was a change in the balance and  
 14 that there was no reporting of the balance after that date.”<sup>84</sup> Silver State’s witness also testified  
 15 that she had used the May 30, 2014 date because “I wanted to ensure that this stated that this was  
 16 a zero balance as of that date, May 30, 2014,” and to ensure the account balance would be zero  
 17 as of a certain time – which in fact was reported.<sup>85</sup> Yet, in the “account history” section of  
 18 Richard’s reinvestigation, Silver State now reported “account balances” of \$11,834 *every month*  
 19 from August 2013 through May 2015 – despite the fact that the account had been “closed” in  
 20 April 2010, and Richard’s bankruptcy had been discharged on May 30, 2014.<sup>86</sup> Silver State’s  
 21 internal records showed a “balance” still owing on the account for many of these post-surrender,  
 22 post-discharge months, but the amount in their records didn’t even match the “balances” listed

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23       <sup>79</sup> Hogue Depo, 178:4-179:2; August 20, 2015 Reinvestigation from Experian, Report No. 3488-0202-41,  
 24 (“Reinvestigation”), at 2 of 20, **Exhibit 14**. The Reinvestigation also contained an “update” to another Silver State  
 25 account Richard held but which he had not disputed; there is no evidence of this “update” elsewhere on the  
 26 Reinvestigation. *See id.* The Reinvestigation has been produced in more legible, color format; a black-and-white  
 27 copy of the partial reinvestigation, which shows the disputed Silver State reporting, is appended to it.

28       <sup>80</sup> Reinvestigation, at 6.

29       <sup>81</sup> Silver State Depo, 206:8-207:6; ACDV Response; Reinvestigation, at 6 of 20.

30       <sup>82</sup> Silver State Depo, 215:8-17; Reinvestigation, at 6 of 20.

31       <sup>83</sup> *See* Reinvestigation, at 6.

32       <sup>84</sup> Silver State Depo, 204:10-205:4.

33       <sup>85</sup> Silver State Depo, 212:1-11; Reinvestigation, at 6 of 20.

34       <sup>86</sup> Silver State Depo, 241:3-16; Reinvestigation, at 6 of 20.

on the “account history” it had reported to Experian.<sup>87</sup> Silver State’s 30(b)(6) witness acknowledged the discrepancy, but could not explain it.<sup>88</sup> Silver State also acknowledged that its internal records show the presence of ten entries which state, “send checking demand letter” – all of which were dated after Richard’s bankruptcy discharge.<sup>89</sup> Again, Silver State’s witness could not explain what these letters were, what content they contained, or whether they’d even been sent out.<sup>90</sup>

17. Silver State’s 30(b)(6) witness also acknowledged that Richard’s dispute asked for the inclusion of a 100-word statement in the event the account was not deleted, but indicated that it was not Silver State’s policy to provide such information on a dispute it obtained from a credit reporting agency, claiming that they could not add such a dispute because there was no provision for one in an ACDV response.<sup>91</sup>

#### **J. Richard sues Silver State, and Silver State retaliates.**

18. On July 11, 2016, Richard sued Silver State.<sup>92</sup> In response, Silver State pulled a particular Experian consumer report, called a “bullseye,” in order to “to make sure that the dispute [Silver State] answered was really what they reported, because [Silver State] was surprised that we were getting served with a complaint after answering the dispute.”<sup>93</sup> Silver State also sent emails to Experian, expressing confusion over why the account was not reporting anymore, contending that it had reported a charge-off of “L” and did not want this negative account to have been removed from Richard’s credit report.<sup>94</sup>

#### **K. Subsequent evidence indicates that Silver State did not notify all other data furnishers of the results of its Experian investigation.**

19. Silver State also testified that it does not send out an Automated Universal

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23           <sup>87</sup> Silver State Depo, 241:17-244:5; Reinvestigation, at 6 of 20; Workflow History, at 1-2.

24           <sup>88</sup> Silver State Depo, 241:17-244:5; Reinvestigation, at 6 of 20; Workflow History, at 1-2.

25           <sup>89</sup> Silver State Depo, 244:19-249:3; Workflow History, at 1-2.

26           <sup>90</sup> Silver State Depo, 245:4-249:21.

27           <sup>91</sup> *Id.* at 107:6-113:18.

28           <sup>92</sup> ECF Dkt. 1.

26           <sup>93</sup> Silver State Depo, 216:25-217:3; July 21, 2016 Experian Bullseye, SSSCU000071 (“Bullseye”), July 21, 2016 Equifax Automated Data View Report, SSSCU000072 (“Data View Report”), and Emails from Tracy Meyer to Experian, SSSCU000073-74 (“Emails”) (collectively, “Silver State Post-Investigation Inquiry”), **Exhibit 15**. Silver State testified that Silver State had received an ACDV from a credit bureau after the filing of a complaint on at least one occasion. Silver State Depo, 221:13-17.

28           <sup>94</sup> Silver State Depo, 216:25-217:3; Silver State Post-Investigation Inquiry.

Dataform (“AUD”) when completing the ACDV process.<sup>95</sup> Silver State’s witness did not indicate whether its ACDV response to Experian would be sent back to the other credit reporting agencies, in the event Silver State modified the information on a consumer’s account (as it had done here).<sup>96</sup> In fact, Silver State had no idea what changes, if any, Experian was authorized to make without notifying Silver State first.<sup>97</sup>

20. However, in this case the evidence suggests that Silver State did not notify all of the other CRAs to whom it reports data of its report of reinvestigation. For example, while the Silver State account thankfully disappeared from Richard’s October 16, 2016 Experian credit report,<sup>98</sup> on Richard’s January 16, 2017 Trans Union credit report, Richard’s account was still being reported as “closed” with a “high balance” of \$13,023, and a “last payment made” on March 10, 2011.<sup>99</sup> Silver State’s 30(b)(6) witness had no explanation for why Trans Union had reported the Silver State account in January 2017, although she acknowledged that the account would report for seven years from March 2010.<sup>100</sup> According to the Trans Union Report, the account had been last updated in on July 31, 2015.<sup>101</sup> This was several days before Silver State responded to Experian’s dispute notice, as Silver State’s ACDV response was dated August 3, 2015.<sup>102</sup>

21. Silver State has testified in other cases that the results of its investigation are sent, if at all, to other CRAs when it send the ACDV response – but not before,<sup>103</sup> and considers its investigation over once it submitted its ACDV response.<sup>104</sup> This, it is not possible that Silver State could have transmitted its Experian reinvestigation to Trans Union, as 15 U.S.C. § 1681s-2(b)(1)(D) required.

<sup>95</sup> Silver State Depo, at 74:3-6.

<sup>96</sup> See *id.* at 73:3-74:24 (“Well, we sent it through e-Oscar. E-Oscar sends it back to the originating CRA, right.”).

<sup>97</sup> *Id.* at 61:23-62:8.

<sup>98</sup> Hogue Depo., 210:21-211:23; October 17, 2016 Experian Credit Report, No. 2035-2841-62, EXP/RHogue000001-24 (“Oct. 2016 Experian Report”), **Exhibit 16**.

<sup>99</sup> Hogue Depo, 302:2-303:5 (cross-examination); Silver State Depo, 264:8-267:24; January 16, 2017 Trans Union Credit Report, File No. 332568055, HOGUE00221-0240 (“Jan. 2017 Trans Union Report”), at 9 of 20, **Exhibit 17**.

<sup>100</sup> Silver State Depo, 264:8-267:24; Jan. 2017 Trans Union Report, at 9.

<sup>101</sup> Silver State Depo, 264:8-267:24; Jan. 2017 Trans Union Report, at 9.

<sup>102</sup> Compare Jan. 2017 Trans Union Report, at 9, with ACDV Response.

<sup>103</sup> Silver State Depo, 73:3-19

<sup>104</sup> Travers Silver State Depo, at 82:19-24.

1           **L. Richard suffered damages, which a trier of fact will have to ascertain.**

2           22. Moreover, and while not explicitly made part of this motion for partial summary  
 3 judgment, Richard has suffered damages as a consequence of this negative reporting. A willful  
 4 FCRA violation results in an award of statutory damages and requires no showing of actual  
 5 damages.<sup>105</sup> For a negligent FCRA violation, Richard can show actual damages.

6           23. Richard testified that he has suffered out-of-pocket expenses.<sup>106</sup> Richard also  
 7 testified that he has suffered exacerbation of prior medical conditions, and stress.<sup>107</sup> Richard was  
 8 also dissuaded or unable to apply for credit, and couldn't put his name on a home he and his wife  
 9 had purchased, due to the reporting on his bankruptcy.<sup>108</sup> For example, Richard believed that  
 10 when he and his wife were shopping for a mortgage, they did not receive as competitive of an  
 11 interest rate because he could not add his income to the loan application, which he would  
 12 otherwise have liked to have signed.<sup>109</sup> Ultimately, Richard was unable to place his name on the  
 13 mortgage, with Richard's rejection being premised on the fact that a bankruptcy was still on his  
 14 credit report.<sup>110</sup> This caused Richard to be upset, as he could not contribute to a major family  
 15 purchase and could not tell his son that he owned a home.<sup>111</sup> The fact that Richard can't  
 16 contribute has also led his wife to pay higher interest rates, and meant that the house was in his  
 17 wife's name only.<sup>112</sup>

18           24. Richard also feared the consequences of having the negative entries on his credit  
 19 report, as this may have a direct impact on his future employment. Richard currently has a job  
 20 working for the federal government, which requires a security clearance and a federal  
 21 background check every five years.<sup>113</sup> The background check is a harrowing experience in  
 22 which agents from the Federal Bureau of Investigation pour over his background information,  
 23 including his credit report.<sup>114</sup> At his last background check in 2012, Richard recalls federal

24           <sup>105</sup> 15 U.S.C. § 1681n.

25           <sup>106</sup> Hogue Depo, 246:11-19.

26           <sup>107</sup> *Id.* at 246:21-247:17.

27           <sup>108</sup> *Id.* at 31:23-32:2.

28           <sup>109</sup> *Id.* at 314:11-23 (cross examination).

<sup>110</sup> *Id.* at 316:17-319:12.

<sup>111</sup> *Id.* at 316:17-319:12.

<sup>112</sup> *Id.* at 313:17-315:14; 316:16-319:12 (cross examination).

<sup>113</sup> *Id.* at 34:20-21 (direct examination); 256:20-259:23 (cross examination).

<sup>114</sup> *Id.* at 256:20- 258:11 (cross examination).

agents paying specific attention to derogatory entries. Depending on when his Silver State account was first “derogatory,” the information either would or wouldn’t appear on his credit report during his 2017 background check. If the seven-year derogatory clock begins running from the date of Richard’s bankruptcy petition, or even the date he surrendered the collateral to Silver State, it will be “aged off” his credit report by the time FBI agents review it again. But if the clock began running from the date of Richard’s bankruptcy discharge in 2014, then the account would stay there until 2021, and might subject Richard to additional, undeserved employment-related scrutiny.<sup>115</sup>

Richard believed that his bankruptcy, and any accounts included therein, should have aged off of his credit report seven years from the date of his petition, or in January 2016.<sup>116</sup> Silver State acknowledged that a negative entry would report for seven years after the date it was originally reported.<sup>117</sup> In other cases, Silver State has admitted that having an account included in bankruptcy could adversely affect credit decisions.<sup>118</sup>

#### **STANDARD OF REVIEW**

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>119</sup> Material facts are those that may affect the outcome of the case.<sup>120</sup> A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party.<sup>121</sup> “Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party’s favor.”<sup>122</sup> A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.”<sup>123</sup>

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<sup>115</sup> *Id.* at 258:17-259:6.

<sup>116</sup> *Id.* at 259:11-23 (cross examination).

<sup>117</sup> Silver State Depo, at 202:12-14.

<sup>118</sup> Travers Silver State Depo, 147:6-148:21.

<sup>119</sup> Fed. R. Civ. P. 56(a).

<sup>120</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>121</sup> *Id.*

<sup>122</sup> *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)).

<sup>123</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining whether to grant or deny summary judgment, courts apply a burden-shifting analysis. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontested at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.”<sup>124</sup> In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial.<sup>125</sup> If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence.<sup>126</sup>

If the moving party satisfies its initial burden, the burden shifts to the opposing party to establish that a genuine issue of material fact exists.<sup>127</sup> To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.”<sup>128</sup> In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data.<sup>129</sup> Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial.<sup>130</sup>

At the summary judgment stage, a court’s function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial.<sup>131</sup> The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in his favor.”<sup>132</sup>

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<sup>124</sup> *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

<sup>125</sup> See *Celotex*, 477 U.S. at 323–24.

<sup>126</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

<sup>127</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

<sup>128</sup> *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987).

<sup>129</sup> See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

<sup>130</sup> See *Celotex*, 477 U.S. at 324.

<sup>131</sup> See *Anderson*, 477 U.S. at 249.

<sup>132</sup> *Id.* at 255.

1 But if the evidence of the nonmoving party is merely colorable or is not significantly probative,  
 2 summary judgment may be granted.<sup>133</sup>

### DISCUSSION

4 The FCRA imposes obligations on persons or entities, such as creditors, that “furnish”  
 5 information to credit reporting agencies.<sup>134</sup> There are two components to a furnisher’s  
 6 obligations under Section 1681s-2 of the FCRA. Subsection (a) sets forth a furnisher’s duty to  
 7 report “accurate information” to the credit reporting agencies.<sup>135</sup> Subsection (b) sets forth a  
 8 furnisher’s duty to conduct an investigation in response to a notice of dispute from a credit  
 9 reporting agency.<sup>136</sup> Although furnishers have obligations under both subsections, only  
 10 subsection (b) contains a private right of action.<sup>137</sup>

11 “To state a claim against a furnisher under Section 1681s-2(b), a plaintiff must allege  
 12 that: (1) [she] found an inaccuracy in [her] credit report; (2) he notified a credit reporting agency;  
 13 (3) the credit reporting agency notified the furnisher of the information about the dispute; and (4)  
 14 the furnisher failed to investigate the inaccuracies or otherwise failed to comply with the  
 15 requirements of 15 U.S.C. § 1681s-2(b)(1)(A)-(E).”<sup>138</sup> When a furnisher receives notice of a  
 16 consumer dispute, the furnisher has the duty to conduct a reasonable investigation to determine  
 17 whether the disputed information is inaccurate, correct any items found to be incomplete or  
 18 inaccurate, and report any corrections to all consumer reporting agencies to which it originally  
 19 furnished the information.<sup>139</sup> Sections 1681n and 1681o provide a right of action that applies to  
 20 Section 1681s-2(b)’s requirement for furnishers to investigate disputes and report  
 21 inaccuracies.<sup>140</sup>

22 Notice of Richard’s dispute is a prerequisite to establishing liability against Silver State  
 23 pursuant to 15 U.S.C. § 1681s-2(b). Ostensibly for this reason, “Congress did provide a filtering

24           <sup>133</sup> See *id.* at 249–50.

25           <sup>134</sup> See 15 U.S.C. § 1681s-2.

26           <sup>135</sup> 15 U.S.C. § 1681s-2(a)(1)-(9).

27           <sup>136</sup> 15 U.S.C. § 1681s-2(b)(b)(1)-(2).

28           <sup>137</sup> See *Gorman v. Wolpoff & Abramson*, 584 F.3d 1147, 1162 (9th Cir. 2009).

<sup>138</sup> *Rieksi v. Bank of America*, No. 2:15-cv-02312-GMN-VCF, 2016 WL 8737439, at \*2 (D. Nev. June 10, 2016); see also *Gorman*, 584 F.3d at 1154 (9th Cir. 2009).

<sup>139</sup> See 15 U.S.C. § 1681s-2(b)(1)(A)-(E).

<sup>140</sup> *Gorman*, 584 F.3d at 1154 (citing 15 U.S.C. §§ 1681s-2(c) and (d)).

1 mechanism in § 1681s-2(b) by making the disputatious consumer notify a CRA and setting up  
 2 the CRA to receive notice of the investigation by the furnisher.”<sup>141</sup> This “filtering mechanism” is  
 3 an “opportunity for the furnisher to save itself from liability by taking the steps required in §  
 4 1681s-2(b).”<sup>142</sup> Thus, Richard’s allegations may proceed on the presumption that a consumer  
 5 reporting agency provided Silver State with notice of Richard’s dispute in compliance with its  
 6 statutory obligations under 15 U.S.C. § 1681i(a)(2).

7       “By its ordinary meaning, an “investigation”,<sup>143</sup> requires an inquiry likely to turn up  
 8 information about the underlying facts and positions of the parties, not a cursory or sloppy  
 9 review of the dispute.”<sup>144</sup> “[T]he plain meaning of the term ‘investigation’ is a ‘detailed inquiry  
 10 or systematic examination,’ which necessarily ‘requires some degree of careful inquiry.’”<sup>145</sup>  
 11 And, “because the purpose of the provision is ‘to give consumers a means to dispute—and,  
 12 ultimately, correct—inaccurate information on their credit reports, a ‘superficial, unreasonable  
 13 inquir[y]’ would hardly satisfy Congress’ objective.” Once Richard notified Silver State of  
 14 potential problems, through Experian, Silver State was not free to “also cabin[] the scope of the  
 15 investigation once undertaken.”<sup>146</sup>

16       For a willful violation, because the FCRA provides for money damages *in lieu* of actual  
 17 damages in case of willful violations, a plaintiff doesn’t need to prove damages and causation to  
 18 maintain a Section 1681i cause of action. Thus, Richard can prove either (i) damages and causation  
 19 to get to negligence, or simply (ii) that the CRA’s failure to reinvestigate reasonably was willful.<sup>147</sup>

20       Here, the facts establish each element: (1) Plaintiff’s April 28, 2015 consumer report

21       <sup>141</sup> *Nelson v. Chase Manhattan Mortg.*, 282 F.3d 1057, 1059 (9th Cir. 2002).

22       <sup>142</sup> *Id.*

23       <sup>143</sup> The FCRA recognizes a distinction between the terms “investigation” and “reinvestigation” to the extent those  
 24 terms reference the duties of a furnisher and CRA, respectively. *Compare* 15 U.S.C. § 1681s-2(b) (referencing the  
 25 furnisher’s duty to *investigate* upon notice of dispute), with 15 U.S.C. § 1681i(a) (referencing a CRA’s duty to  
 26 *reinvestigate* upon notice of a dispute). However, while the respective terms evince a different set of respective procedural  
 27 duties, the crux of either set of duties may still be understood by the ordinary meaning of the term “investigation.”

28       <sup>144</sup> *Gorman*, 584 F.3d at 1155 (adopting the rationale in *Johnson v. MBNA Am. Bank*, 357 F.3d 426, 429–31 (4th  
 Cir. 2004)).

29       <sup>145</sup> *Id.* (quoting *Johnson*, 357 F.3d at 430).

30       <sup>146</sup> *Id.*

31       <sup>147</sup> *Saenz v. Trans Union*, 621 F. Supp. 2d 1074, 1082 (D. Or. 2007). The requirement that a FCRA plaintiff seeking  
 32 to prove willfulness need not establish damages and causation has been recently supported by other courts in this District.  
 33 See, e.g., *In re Ocwen Loan Servicing LLC Litig.*, --- F. Supp. 3d ----, No. 16-cv-200-MMD-WGC, 2017 WL 1289826, at  
 34 \*5 (D. Nev. Mar. 3, 2017) (considering violation of 15 U.S.C. § 1681b); *Smith v. One Nevada Credit Union*, No. 16-cv-  
 35 2156-GMN-NJK, 2017 WL 2803169 (D. Nev. June 27, 2017) (interpreting *In re Ocwen*).

1 contained inaccuracies on his Silver State account,<sup>148</sup> (2) on July 17, 2015, Richard sent his Dispute  
 2 to Experian, pointing out inaccuracies in Silver State's reporting;<sup>149</sup> (3) Experian forwarded on the  
 3 dispute to Silver State,<sup>150</sup> and (4) Silver State failed to reasonably investigate the inaccuracies and  
 4 comply with the requirements of the FCRA 15 U.S.C. § 1681s-2(b)(1)(A)-(E), by rereporting  
 5 inaccurate information, adding more inaccurate information, and failing to send the results of his  
 6 investigation to other CRAs.<sup>151</sup> Richard also incurred statutory damages, because Silver State's  
 7 reporting was reckless and willful; in that scenario, he need not prove actual damages.<sup>152</sup> But to the  
 8 degree relevant, Richard's out-of-pocket expenses were caused by Silver State's negligently  
 9 inaccurate reporting and rereporting.<sup>153</sup> Establishing the elements of either a negligent or willful  
 10 FCRA violation also entitles the plaintiff to an award of reasonable attorney's fees and costs.<sup>154</sup>

11       **1. Experian reported patently inaccurate information on Richard's consumer report.**

12       The Silver State tradeline, as reported by Experian on April 28, 2015, contained patently  
 13 incorrect and materially misleading information.<sup>155</sup> Specifically, Richard's Silver State account  
 14 failed to reflect that it had been included in Chapter 13 bankruptcy; instead it reported that the  
 15 account had been "Discharged Though BK Ch 7, 11, or 12 on Apr 3, 2010."<sup>156</sup> Silver State also  
 16 reported post-petition, post-plan-confirmation late payment amounts from June 2009-March 2010,  
 17 culminating in a notation that the collateral had been "voluntarily surrendered" in March 2010.<sup>157</sup>

18       **2. Richard notified Experian of the dispute.**

19       Richard notified Experian of the dispute on July 17, 2015.<sup>158</sup> Richard attached his April 28,  
 20 2015 report from Experian, along with pages from his Chapter 13 bankruptcy docket and appropriate  
 21 identifying information.<sup>159</sup> Richard also outlined the problems with his reporting as stemming from

23       <sup>148</sup> Statement of Undisputed Material Facts, *supra*, ("SUMF"), at ¶ 6.

24       <sup>149</sup> *Id.* at ¶ 7.

25       <sup>150</sup> *Id.* at ¶ 8.

26       <sup>151</sup> *Id.* at ¶¶ 14,-17, 19-21.

27       <sup>152</sup> *Id.* at ¶¶ 10-12, 18-22.

28       <sup>153</sup> *Id.* at ¶¶ 22-25.

23       <sup>154</sup> ECF Dkt. 1; 15 U.S.C. §§ 1681n, 1681o.

24       <sup>155</sup> *Id.* at ¶ 6.

25       <sup>156</sup> *Id.*

26       <sup>157</sup> *Id.*

27       <sup>158</sup> *Id.* at ¶ 7.

28       <sup>159</sup> *Id.*

1 the post-bankruptcy reporting, and indicated that the account was included in his bankruptcy – which  
 2 was (1) not a Chapter 7, 11, or 12 bankruptcy, nor (2) had his debt been “included” therein in April  
 3 2010.<sup>160</sup> Experian clearly received the dispute, as it submitted an ACDV to Silver State.<sup>161</sup>

4       **3. Experian notified Silver State of the dispute.**

5       Experian notified Silver State of Richard’s Dispute by sending Silver State an ACDV,  
 6 Richard’s Dispute, and the other documents he’d attached to his Dispute, to Silver State.<sup>162</sup> Silver  
 7 State submitted an ACDV response to Richard’s Dispute.<sup>163</sup>

8       **4. Silver State failed to reasonably investigate the inaccuracies and comply with the**  
 9 **requirements of 15 U.S.C. § 1681s-2(b)(1)(A)-(E).**

10      **A. Silver State reported patently incorrect information to Experian.**

11     “[An item in a consumer’s file can be “‘incomplete or inaccurate’ . . . ‘because it is patently  
 12 incorrect. . . .’”<sup>164</sup> “[I]nformation that is inaccurate ‘on its face,’ is ‘patently incorrect.’”<sup>165</sup> Thus,  
 13 “representations that Plaintiff still owed a debt and its implication that the debt might still be  
 14 collectible following the bankruptcy discharge [are] inaccurate.”<sup>166</sup>

15     A confirmed Chapter 13 plan controls for the purpose of correctly reporting credit  
 16 performance, and failure to report payment obligations consistent with the confirmed plan is patently  
 17 incorrect. The Bankruptcy Code, 11 U.S.C. § 1327(a), provides that “[t]he provisions of a confirmed  
 18 plan *bind the debtor and each creditor. . . .*”<sup>167</sup> Recently, the United States Supreme Court held:

19     Confirmation has preclusive effect, foreclosing relitigation of “any issue actually  
 20 litigated by the parties and any issue necessarily determined by the confirmation  
 21 order.” 8 Collier ¶ 1327.02[1][c], at 1327–6; *see also United Student Aid Funds, Inc.*  
*v. Espinosa*, 559 U.S. 260, 275, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010) (finding a  
 22 confirmation order “enforceable and binding” on a creditor notwithstanding legal  
 error when the creditor “had notice of the error and failed to object or timely

23       <sup>160</sup> *Id.*

24       <sup>161</sup> *Id.* at ¶¶ 7-8.

25       <sup>162</sup> *Id.* at ¶¶ 8, 14.

26       <sup>163</sup> *Id.* at ¶¶ 8, 14.

27       <sup>164</sup> *Carvalho v. Equifax*, 629 F.3d 876, 890 (9th Cir. 2010) (quoting *Gorman*, 584 F.3d at 1163).

28       <sup>165</sup> *Drew v. Equifax*, 690 F.3d 1100, 1108 (9th Cir. 2012) (quoting *Carvalho*, 629 F.3d at 891).

29       <sup>166</sup> *Rieikki v. Bank of America*, 2:15-cv-02312-GMN-VCF, Doc. 57 at 4 (D. Nev. June 10, 2016) (denying furnisher’s  
 motion to dismiss); *Polvorosa v. Allied Collection Serv.*, No. 2:16-cv-1508-JCM-CWH, 2017 WL 29331, at \*4 (D. Nev.  
 Jan. 3, 2017) (denying furnisher’s motion to dismiss and holding that reporting derogatory information during and  
 bankruptcy and contrary to debtor’s payment performance during the pendency of the bankruptcy sufficient to state a  
 claim for inaccurate reporting).

30       <sup>167</sup> 11 U.S.C. § 1327(a) (emphasis added).

1 appeal”). Subject to certain exceptions, confirmation “vests all of the property of the  
 2 [bankruptcy] estate in the debtor,” and renders that property “free and clear of any  
 3 claim or interest of any creditor provided for by the plan.” §§ 1327(b), (c).<sup>168</sup>

4 Thus, the “order confirming a chapter 13 plan is binding, and *res judicata* precludes a creditor  
 5 from bringing a collateral attack of that order.”<sup>169</sup> “The reason for this is simple and mirrors the  
 6 general justification for *res judicata* principles-after the affected parties have an opportunity to  
 7 present their arguments and claims, it is cumbersome and inefficient to allow those same parties to  
 8 revisit or recharacterize the identical problems in a subsequent proceeding.”<sup>170</sup> “This is especially  
 9 true in the bankruptcy context, where a confirmed plan acts more or less like a court-approved  
 10 contract or consent decree that binds both the debtor and all the creditors.”<sup>171</sup>

11 Here, Richard’s Silver State account was subject to the controlling terms of his confirmed  
 12 plan because Richard included the account on his January 31, 2009 bankruptcy petition, thus any  
 13 derogatory information reported on these tradelines after the petition date could only be reported, if at  
 14 all, if Richard failed to meet his obligations under the plan. Neither the trustee, nor any party in  
 15 interest opposed plan confirmation or sought dismissal or conversion based on non-payment under  
 16 the confirmed plan.<sup>172</sup> When the bankruptcy court entered its order confirming the plan, Silver State  
 17 was bound by the plan’s terms of repayment. The bankruptcy court’s order confirming the plan  
 18 precludes any collateral attack of that order, at least until Silver State moved to and actually obtained  
 19 an order lifting of the stay of the Court’s order in March of 2010. Even then, the order permitted  
 20 Silver State to exercise its rights against the collateral *only*, not against Richard *personally*.<sup>173</sup>

21 In this context, Silver State’s reporting that these debts had been “included in Chapter 13  
 22 Bankruptcy” on March 30, 2014 – the date of Richard’s *discharge*, but not his *petition* – was patently  
 23 incorrect.<sup>174</sup> Moreover, although Silver State reported a “recent balance” of \$0 as of May 2014, in  
 24 the “payment history” section Silver State *continued to report post-discharge balances* of \$11,834 in

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25       <sup>168</sup> *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (holding that plan confirmation alters the status quo and  
 26 fixes the rights of the parties).

27       <sup>169</sup> *In re Okosisi*, 451 B.R. 90, 100 (Bankr. D. Nev. 2011) (citing *In re Brawders*, 503 F.3d 856, 867 (9th Cir. 2007)).

28       <sup>170</sup> *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000).

29       <sup>171</sup> *Id.*; *Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004) (“[A] plan [of reorganization] is essentially a  
 30 contract between the debtor and his creditors, and must be interpreted according to the rules governing the interpretation of  
 31 contracts.” (citing *Hillis Motors v. Haw. Auto. Dealers Ass’n*, 997 F.2d 581, 588 (9th Cir.1993))).

32       <sup>172</sup> See SUMF, at ¶¶ 2-5.

33       <sup>173</sup> *In re Okosisi*, 451 B.R. at 100.

34       <sup>174</sup> *Id.*

every month from June 2014 through May of 2015.<sup>175</sup> Put simply, the \$0 balance and the post-discharge balance reporting cannot possibly both be correct. Finally, Silver State's reporting of post-petition late payments from June 2009 through October 2009, and post-plan-confirmation payments between November 2009 and February 2010, was also patently incorrect,<sup>176</sup> as Silver State had knowledge of both Richard's Petition and October 2009 Confirmed Plan, as well as the fact that Richard agreed to "surrender" his interest in the collateral.<sup>177</sup> Silver State only obtained an order lifting the stay months later, in March of 2010.

Silver State failed to conduct a reasonable investigation, failed to review all relevant information provided by Richard in his Dispute to Experian, and failed to correct and update Richard's information, as reflected in Silver State's ACDV response where Silver State included both the Chapter 13 bankruptcy indicator, and the "charge off" indicator.<sup>178</sup> As a consequence of Silver State's reporting this patently incorrect information in its ACDV responses, Richard's Experian Reinvestigation rereported that the account had been "included" in Chapter 13 bankruptcy on the date of discharge, continued reporting derogatory post-petition payment history, and now included new post-discharge account balances in the "account history section – all while reporting the account as having a \$0 balance.<sup>179</sup> The information Silver State reported was patently incorrect, and had the consequence of appearing to "re-age" Richard's debt in violation of 15 U.S.C. § 1681c.

#### **B. Silver State reported materially misleading information to Experian.**

Under the FCRA, a "materially misleading" statement is concerned with omissions to credit entries that in context create misperceptions about otherwise factually accurate data.<sup>180</sup> "Materially misleading" means that information is misleading "in such a way and to such an extent that it can be expected to adversely affect credit decisions."<sup>181</sup> "[I]nformation that is open to an interpretation that

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<sup>175</sup> See *id.* at ¶ 16.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at ¶¶ 2-3.

<sup>178</sup> See *id.* at ¶ 14.

<sup>179</sup> *Id.* at ¶¶ 14-17.

<sup>180</sup> See, e.g., *Gorman*, 584 F.3d at 1163 (9th Cir. 2009) (citing *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 148-50 (4th Cir. 2008) ("Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading.")).

<sup>181</sup> 584 F.3d at 1163 (quoting *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir.1998)).

1 is directly contradictory to the true information is sufficiently misleading to qualify as inaccurate.”<sup>182</sup>

2 A Plaintiff may establish that a Furnisher’s failure to follow industry reporting guidelines are  
 3 materially misleading where (1) the Furnisher adopts the standard, (2) the Furnisher deviated from  
 4 the standard, and (3) this “deviation might adversely affect credit decisions—in other words, that  
 5 entit[ies] would have expected [the defendant Furnisher] to report in compliance with the [2015  
 6 Metro 2] guidelines.”<sup>183</sup>

7 Here, it is undisputed that Silver State adopted the standard, as it testified that the CRRG  
 8 formed a part of its policies and procedures for reinvestigation.<sup>184</sup> Silver State also deviated from the  
 9 standard in reporting the bankruptcy information in question. Here, the CRRG’s “Explanation and  
 10 Examples of FCRA Compliance Date of First Delinquency (Field 25) indicates that “any other  
 11 adverse item of information . . . which antedates the report by more than seven years” should be  
 12 excluded from reporting.<sup>185</sup> Since the bankruptcy petition would have been the first delinquent event,  
 13 it was inaccurate and materially misleading for Silver State to report the debt as “included” in  
 14 Chapter 13 bankruptcy on April 30, 2014.<sup>186</sup>

15 The CRRG’s FAQ 28(a) also requires a data furnisher to report the “account status” at the  
 16 time of petition (which based on the reporting would have been “current”).<sup>187</sup> Thus, by reporting  
 17 post-petition late payments, Silver State also failed to follow the CRRG guidelines, which was both  
 18 inaccurate and materially misleading. Finally, because the account status at the time of Richard’s  
 19 petition was current, it was inaccurate for Silver State to report the account as a “charge-off.”

20 These failures stemmed from the fact that Silver State’s ACDV response inaccurately  
 21 reported the account as both included in bankruptcy, and the fact the account had been “charged off.”  
 22 By failing to properly report data to Experian in its ACDV response, as Pages 5-42 and 6-19 of the  
 23 CRRG required, Silver State deviated from the CRRG standards, and rendered the information  
 24 materially misleading, and thus inaccurate.

25 Finally, it is clear that these entries might affect credit decisions; nothing on the face of

26 <sup>182</sup> *Toliver v. Experian*, 973 F. Supp. 2d 707, 715 (S.D. Tex. 2013) (citations and quotations omitted).

<sup>183</sup> *Nissou-Rabban v. Capital One Bank (USA)*, 2016 WL 4508241, at \*5 (S.D. Cal. June 6, 2016) (citations and quotations omitted).

<sup>184</sup> SUMF, at ¶ 10.

<sup>185</sup> See SUMF, at ¶ 10; CRRG, page 5-42.

<sup>186</sup> See CRRG, page 5-42; see also 15 U.S.C. § 1681c.

<sup>187</sup> See SUMF, at ¶ 10; CRRG, page 6-19.

1 Experian's Reinvestigation indicated that the accounts would "age off" earlier than the bankruptcy-  
 2 inclusion date, which Silver State's witness corroborated when she testified that the 7-year  
 3 derogatory period would have run from the date the account was first listed as "charged off."<sup>188</sup>  
 4 Silver State itself was surprised by this; when it pulled Richard's July 21, 2016 "Bullseye" consumer  
 5 report from Experian, discovered the account was no longer reporting, it contacted Experian and  
 6 asked why the account was no longer reporting, as Silver State had not directed Experian to remove  
 7 it.<sup>189</sup> Moreover, the Reinvestigation indicated the paradoxical "zero balance" as of May 2014, yet a  
 8 steady stream of account post-discharge account balances, for which there was no meaningful  
 9 explanation.<sup>190</sup> Even if one of these notations is "correct," then the other cannot be – and both are  
 10 inaccurate and materially misleading as a result. Moreover, Silver State admitted elsewhere that  
 11 having an account included in bankruptcy could adversely affect credit decisions.<sup>191</sup>

12       Even assuming *arguendo* that Silver State believes it was entitled to remove Richard's  
 13 Suzuki from the bankruptcy and continue reporting on the account as if the bankruptcy never  
 14 occurred, Silver State's the reporting was still derogatory because it continued to report that the  
 15 Suzuki had been "included" in Chapter 13 bankruptcy on the date of the discharge, which would  
 16 effectively re-age a debt on an asset which Silver State had reported that Richard voluntarily  
 17 surrendered in April of 2010.<sup>192</sup> And even if Silver State believed it was entitled to report this  
 18 conflicting information, there is still no explanation at all for why it would have reported a \$0  
 19 balance on the account in May 2014 when Richard received his discharged, while at the same time  
 20 reporting post-discharge balances of \$11,834 *every month* from May 2014 through May of 2015.

21       In sum, the reporting on Silver State's ACDV responses and the Experian Reinvestigation  
 22 was materially misleading because it deviated from the CRRG reporting standards and simply does  
 23 not make sense to either a future credit decision-maker, or to anyone with a passable grasp on the  
 24 English language and a modicum of common sense.

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 26       <sup>188</sup> SUMF, at ¶ 13.  
 27       <sup>189</sup> *Id.* at ¶ 18.  
 28       <sup>190</sup> *Id.* at ¶¶ 15-16.  
       <sup>191</sup> *Id.* at ¶ 25.  
       <sup>192</sup> *Id.* at ¶¶ 15-16.

1           **C. Silver State failed to properly notify all other CRAs of the results of its Experian  
2 investigation.**

3           15 U.S.C. § 1681s-2(b)(1)(D) requires that after completing an investigation which finds  
4 that information is incomplete or inaccurate, a data furnisher must “report those results to all  
5 other consumer reporting agencies to which the person furnished the information and that  
6 compile and maintain files on consumers on a nationwide basis.”<sup>193</sup> Silver State failed to do this  
7 after finding inaccuracies on Richard’s Experian dispute. Silver State’s 30(b)(6) witness testified  
8 that it would transmit the results of its reinvestigation no earlier than the date of the ACDV, and  
9 Silver State sent its ACDV response to Experian on August 3, 2015.<sup>194</sup> However, Richard’s  
10 January 2017 Transunion credit report still lists the disputed tradeline, which it reports as “last  
11 updated” on July 31, 2015 – *before* Silver State sent the Experian ACDV.<sup>195</sup>

12           The January 2017 Transunion account, as reported, fails to indicate that the account was  
13 included in bankruptcy (and in fact should have “aged off” as of January 2016 as a result), but  
14 instead that the account contains a “high balance” of \$13,023, and a “date closed” of March 31,  
15 2010.<sup>196</sup> Incidentally, Silver State’s non-reporting also resulted in his account being reported  
16 with Trans Union for a longer period than it should have if the account had been dated from his  
17 January 2009 petition date. In failing to send Transunion the results of its Experian  
reinvestigation, Silver State violated 15 U.S.C. § 1681s-2(b)(1)(D).

18           **5. Richard suffered statutory damages, as Silver State’s conduct was both reckless willful.**

19           Under the FCRA, a plaintiff may demonstrate willfulness by showing a reckless disregard of  
20 statutory duty, including 15 U.S.C. § 1681s-2(b).<sup>197</sup> A defendant acts in reckless disregard if its  
21 action “is not only a violation under a reasonable reading of the statute’s terms, but shows that the  
22 company ran a risk of violating the law substantially greater than the risk associated with a reading  
23 that was merely careless.”<sup>198</sup> A defendant is liable if it takes action involving “an unjustifiably high  
24 risk of harm that is either known or so obvious that it should be known.”<sup>199</sup> “The statutory

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25           <sup>193</sup> *Id.*

26           <sup>194</sup> *Id.* at ¶¶ 19-21.

27           <sup>195</sup> *Id.*

28           <sup>196</sup> *Id.*

29           <sup>197</sup> *Safeco*, 551 U.S. at 56–60.

30           <sup>198</sup> *Bateman v. Am. Multi-Cinema*, 623 F.3d 708, 711 n.1 (9th Cir. 2010) (quoting *Safeco*, 551 U.S. at 69). See also  
31 *Smith*, 2017 WL 2803169 (D. Nev. June 27, 2017).

32           <sup>199</sup> *Id.* (quoting *Safeco*, 551 U.S. at 68).

1 requirement of willfulness does not require proof of intent to cause harm, but only an intent to fail to  
 2 comply with the FCRA.”<sup>200</sup> A consumer can recover punitive damages for willful non-  
 3 compliance.<sup>201</sup> “Courts in this circuit have found that ‘[w]illfullness under the FCRA is generally a  
 4 question of fact for the jury.’”<sup>202</sup>

5 A consumer can recover punitive damages for willful non-compliance.<sup>203</sup> A denial of credit  
 6 is not a prerequisite to recovery under the FCRA.<sup>204</sup> “The term ‘actual damages’ has been  
 7 interpreted to include recovery for emotional distress and humiliation.”<sup>205</sup> Under the FCRA, a  
 8 plaintiff’s out-of-pocket costs necessary for disputing a consumer report constitute cognizable  
 9 economic damages.<sup>206</sup>

10       **A. Silver State’s reporting of inaccurate and materially misleading information was  
       reckless, as shown through its lackadaisical approach to its compliance obligations.**

11       The undisputed facts easily establish that Silver State’s actions were reckless. The CRRG  
 12 reporting guidelines, which Silver State admits it incorporated as part of its policies and procedures,  
 13 required Silver State to “assume all responsibility concerning your use of the CRRG, including  
 14 meeting any requirements or obligations of your contracts with third parties.”<sup>207</sup> Yet, in other cases,  
 15 Silver State admits that it used e-Oscar, it could not find a written contract governing the terms of its  
 16 engagement – and thus could not explain how, or under what circumstances, its reporting obligations  
 17 would be triggered, or whether its own policies and procedures reflected them. Indeed, Silver State  
 18 could not confirm that it had a copy of the e-Oscar contract at the time it designed its own policies

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200 *Centuori v. Experian*, 431 F. Supp. 2d 1002, 1011 (D. Ariz. 2006)

201 15 U.S.C. § 1681n.

202 *Taylor v. First Advantage Background Servs.*, 207 F. Supp. 3d 1095, 1110 (N.D. Cal. 2016) (quoting *Edwards v. Toys “R” Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007)) (citing *Guimond*, 45 F.3d at 1333). See also *Heaton v. Soc. Fin.*, 2015 WL 6744525, at \*6 n.5 (N.D. Cal. Nov. 4, 2015) (“The mixed nature of the willfulness inquiry—with issues of law and fact intertwined—is the precise reason the question is best reserved for a finder of fact.”) (citing *Smith v. LexisNexis Screening Sols.*, 76 F. Supp. 3d 651, 665 (E.D. Mich. 2014)); *Fregoso v. Wells Fargo Dealer Servs.*, 2012 WL 4903291, at \*7 (C.D. Cal. Oct. 16, 2012) (holding that in the context of willful violations of 15 U.S.C. § 1681s-2(b) of the FCRA, if the plaintiff succeeds in making his *prima facie* case, the furnisher must demonstrate legal certainty that it met all obligations to avoid having the reasonableness of its response qualify as a triable issue of fact).

203 15 U.S.C. § 1681n.

204 *Guimond*, 45 F.3d at 1333 (9th Cir. 1995).

205 *Id.* (citing *Johnson v. Department of Treasury, I.R.S.*, 700 F.2d 971, 984 (5th Cir. 1983) (finding mental anguish recoverable in FCRA claims); *Thompson v. San Antonio Retail Merchants Ass’n*, 682 F.2d 509, 514 (5th Cir. 1982); *Millstone v. O’Hanlon Reports*, 528 F.2d 829, 834–35 (8th Cir. 1976); *Bryant v. TRW*, 487 F. Supp. 1234, 1240 (E.D. Mich. 1980), *aff’d*, 689 F.2d 72 (6th Cir. 1982); *Jones v. Credit Bureau of Huntington*, 184 W.Va. 112, 117, (1990)); see *Drew*, 690 F.3d at 1109.

206 *Saenz*, 621 F. Supp. 2d at 1085.

207 SUMF, at ¶ 10; CRRG, page i.

1 and procedures, such that its reporting could conform to its conditions for use of the e-Oscar  
 2 system.<sup>208</sup>

3 And as it related to Experian, Silver State could not even confirm that Experian and Silver  
 4 State adhered to the same reporting guidelines. Silver State could not confirm that it had a fully  
 5 executed contract with Experian at all – because the sixteen-year-old, three-page “subscriber  
 6 agreement” is signed only by Silver State, but not Experian.<sup>209</sup> Without any fully executed  
 7 contractual relationship with Experian, there is effectively nothing suggesting that Silver State was  
 8 bound by any terms at all regarding its obligation to report data to Experian correctly, other than the  
 9 FCRA itself.

10 Silver State’s internal records were similarly in a state of confusion and disrepair. Silver  
 11 State had thrown out a copy of the relevant CRRG manual, and thus can’t justifiably say that it relied  
 12 in this guidance in responding to Richard’s Experian dispute. Silver State also disregarded its own  
 13 policies regarding document retention, as it failed to save a copy of the draft ACDV response it sent  
 14 regarding Richard’s dispute, or any of Richard’s dispute correspondence.<sup>210</sup> Nor are Silver State’s  
 15 internal files consistent: Silver State admitted that its records regarding the amount “owed” on  
 16 Richard’s relevant Silver State account don’t even match the post-discharge account-history  
 17 reporting in Richard’s Experian reinvestigation. Silver State had no explanation for this discrepancy  
 18 at all.<sup>211</sup>

19 In sum, the undisputed facts related to Silver State’s lackadaisical approach to its own  
 20 contractual agreements, its policies and procedures, and its internal record-keeping show that Silver  
 21 State never took remotely adequate steps to confirm that it would accurately report data to credit  
 22 reporting agencies, or reasonably and comprehensively investigate consumer disputes brought to its  
 23 attention. Silver State’s fundamental and self-made failures show that it recklessly abdicated its  
 24 statutory obligations to ensure the accurate reporting of data and thorough investigation of consumer  
 25 disputes. Silver State’s failures were more than merely unreasonable; they were reckless. By  
 26 extension, for the purposes of the FCRA, they were willful.

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27 <sup>208</sup> SUMF, at ¶¶ 10-12.

28 <sup>209</sup> *Id.* at ¶¶ 11.

<sup>210</sup> *Id.* at ¶¶ 8-9.

<sup>211</sup> *Id.* at ¶ 16.

1           **B. Silver State's conduct was willful because it reaffirmed its errors, even after it  
2           viewed the results of Experian's reinvestigation on Richard's Bullseye report.**

3           Silver State's July 21, 2016 "Bullseye" and Silver State's responses confirm that Silver State  
4           was surprised that Richard's account appears to have "aged off" in January 2016 – as Silver State's  
5           intention was to report the debt as "charged off," presumably in 2010 after the bankruptcy petition  
6           was filed.<sup>212</sup> Thus, Silver State reaffirmed the fundamental error and deviation from the CRRG  
7           guidelines after it viewed the account, when Silver State should have at least acknowledged that  
8           the "charge off" notation was inaccurate under the CRRG's FAQ 28(a).<sup>213</sup> Silver State's  
9           continual reporting of Richard's Silver State account on his Transunion credit report in January  
10          2017 is further evidence of Silver State's willfulness.

11          **6. The undisputed material facts satisfy the remaining factors to make out a negligent  
12           violation of 15 U.S.C. § 1681s-2(b)**

13          Even if the Court finds that Silver State's failure isn't willful, it's undisputedly negligent, and  
14          Richard's suffered actual damages in the form of out-of-pocket expenses.<sup>214</sup> "The term 'actual  
15           damages' has been interpreted to include recovery for emotional distress and humiliation."<sup>215</sup> Under  
16          the FCRA, a plaintiff's out-of-pocket costs necessary for disputing a consumer report constitute  
17          cognizable economic damages.<sup>216</sup> A denial of credit isn't a prerequisite to FCRA recovery.<sup>217</sup>

18          At his deposition, also testified that he has been dissuaded or unable to apply for credit,  
19          and couldn't put his name on a home he and his wife had purchased, due to the reporting on his  
20          bankruptcy – causing Richard to be upset, as he could not contribute to a major family purchase  
21          and could not tell his son that he owned a home.<sup>218</sup> The fact that Richard can't contribute has  
22          also led his wife to pay a higher interest rate, and meant that the house was in his wife's name

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22          <sup>212</sup> *Id.* ¶ at 18.

23          <sup>213</sup> *Id.* at ¶ 10; CRRG, page 6-19.

24          <sup>214</sup> *Id.* at ¶ 23.

25          <sup>215</sup> *Id.* (citing *Johnson v. Department of Treasury, I.R.S.*, 700 F.2d 971, 984 (5th Cir.1983) (finding mental anguish  
26          recoverable in FCRA claims); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 514 (5th Cir. 1982);  
27          *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834–35 (8th Cir. 1976); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1240  
28          (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); *Jones v. Credit Bureau of Huntington, Inc.*, 184 W.Va. 112, 117,  
29          (1990)); *see Drew*, 690 F.3d at 1109.

30          <sup>216</sup> *Saenz*, 621 F. Supp. 2d at 1085. Richard's also incurred attorney's fees as a result of prosecuting this action.  
31          While again not a part of Richard's motion for partial summary judgment, and a categorical necessity if the Court finds  
32          that Silver State willfully or recklessly violated the FCRA, the Court may elect to find Richard's out-of-pocket damages  
33          "close out" Silver State's liability.

34          <sup>217</sup> *Guimond*, 45 F.3d at 1333 (9th Cir. 1995).

35          <sup>218</sup> SUMF, at ¶ 23.

only.<sup>219</sup> Silver State's suggested "re-aging" of his debt also caused Richard anxiety in that there was a heightened risk that his upcoming federal background check and necessary security clearance would be compromised if the seven year "re-aging" of his bankruptcy ran from any date other than his voluntary bankruptcy petition, and thus became a topic of conversation. Finally, Richard suffered exacerbation of prior medical conditions, and stress.<sup>220</sup> In sum, Richard has demonstrated his entitlement to a host of actual damages in the event of a mere negligent recovery against Silver State.

## CONCLUSION

For the foregoing reasons, Richard requests that his motion for partial summary judgment against Silver State be granted and that Silver State be found to have both negligently and willfully violated 15 U.S.C. § 1681s-2(b). Richard's damages are properly reserved for trial.

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Respectfully submitted,

*/s/ Miles N. Clark*

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219 *Id.*

220 *Id.* at ¶ 24.